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**MONTANA 1st JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

Public Service Commissioner Brad Molnar) Cause No. BDV-06-372
on behalf of Residents of Public Service)
Commission District 2 and all others)
served by NorthWestern Energy.)

Plaintiff

Vs.

Montana Public Service Commission,
PPL Montana LLC

Defendants.

BRIEF IN OPPOSITION OF
MOTION TO DISMISS FILED
BY DEFENDANT PPL
AND REQUEST THAT THIS
) SUPPLEMENT, AND BE
) INCORPORATED INTO, BRIEF
) IN OPPOSITION TO MOTION TO
) DISMISS FIELD BY PSC

INTRODUCTION

Brad Molnar plaintiff on behalf of, and as representative of, the people of PCS District 2 served by default provider NorthWestern Energy, and all others similarly situated, submits this brief in opposition to the PPL Montana, LLC's Motion to Dismiss.

BACKGROUND

On May 24, 2006 incumbent Public Service Commissioner Brad Molnar, appearing Pro se, "on behalf of Residents of Public Service Commission District 2 and all others

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similarly situated, filed Complaint in this court naming the Montana Public Service Commission (PSC) and "PPL Montana, LLC" (PPL) as defendants. In the complaint Commissioner Molnar alleges that the action taken by the PSC on May 25, 1999 in PSC Docket No. D99.4.82 was done with purposeful and numerous violations of state law and Federal law, with the ultimate intention of circumventing state law, and to mislead a Federal agency. These acts are admitted by defendants and were done to prematurely, imprudently, and illegally deregulate the old Montana Power Company so as to increase the value of, and expedite the sale of, their generation assets to PPL. This was done via the PSC, a state agency with powers limited to inside the exterior borders of Montana, granting the EWG status in Montana to PPL, a company with no generation assets in Montana at the time of the granting.

THIS COMPLAINT IS A LAWFUL ATTEMPT TO INSTITUTE
JUDICIAL REVIEW OF ILLEGAL AGENCY ACTION

PPL wrongly asserts that Plaintiffs have brought this action in an untimely a manner citing Undelhoven v. State and Nye v. Department of Livestock.

They rely on their interpretation of MCA 69-3-402. Plaintiff states the 30 day limitation starts when the unlawful nature of the activity, and judicial cure, is known and that it would be against legislative intent for 69-3-402 to be used as a shield for unlawful activity based on an ability to hide illegal activity for just 30 days. Plainly defendant's interpretation is contrary to MCA 1-4-104 as it takes away the natural right of society to hold government, and individuals, reasonably accountable. IF as PPL and PSC claim it is a shield for illegal activity then surely the 30 day limitation does not apply without exception. Given the defendants scenario that if three commissioners and affected lobbyists agree to an illegal course of action to reduce another's rights or holdings then, with the other two Commissioners held to be without standing, no judicial remedy is available to protect the public once the illegal action is known to, or felt by, the general public. Even flagrant constitutional violations could not be challenged in the courts. Such an interpretation is ridiculous. Rejection of such an interpretation is well within the realm of the Equitable Powers of the court. Further, no other person or group is given protection from judicial review of illegal acts after 30 days of the occurrence. Therefore they are denied equal protection under the law. Such a strict interpretation would make MCA 69-3-402 unconstitutional and, as such, should be struck down.

Further, plaintiff points out that statute 69-3-402 covers only the specific items listed; "the commission fixing any rate, fare, charge, classification, or joint rate, or any order fixing any regulation, practice or service..." On page two of Docket commission admits "There are no procedural requirements, within the commissions rules or statutes or other state administrative processes that govern a request to consent to EWG status." Thus PSC's own documentation admits that 69-3-402 (nor any other statute) covers this action. Again, Page 2 of the Docket clarifies that this was consent to obtain a federally granted status, a stipulation of facts, thus not covered by 69-3-402 as referenced by Undehoven.

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Further. It is assumed that the state legislature knows the federal laws that concern state actions and as such will amend state laws to reflect same. As EWG status was created by amending federal law in 1992 there was ample time for the state legislature to amend MCA 69-3-402 to add "Stipulation of facts and consent or denial to federal status requests" if they wanted to give protection to the PSC for illegally doing same.

Further. *Expressio unius est exclusion alterius* precludes anything not specifically enumerated in the MCA 69-3-402 being used as cause for enforcement of stopping legal action. *Franzke v. Fergus County*, 76M 150, 245P 962 (1926) *Stephens v. Greatfalls*, 119M 368, 175 P2d 408 (1946) *St. v. Lewis*, 52M 495, 159 P 415 (1916) *Baker v. Berger*, 265 M21, 873 P2d 940, 51 St. Rep.389 (1994) *Northam v. Cas. Co. of am.*, 177 F 981 (9th Cir. 1909).

Section 15 U.S.C. 79z-5a(c) does not provide a process for the states to render their consent to the EWG status further undermining the claim of this action of the commission being included in the, frankly, odd interpretations of absolute protections of the commission's illegal actions as delineated in 69-3-402 (1979). EWG status and process would not even be contemplated for another 14 years.

Further. *Nye v. Department of Livestock* was about a right to judicial review under a contested case. As outlined in the complaint, and admitted by defendant, though a contested case was required by law no contested case was ever held so no appeal could be granted. *Stow v. Board of Administration* (1977), 172 Mont. 337, 564 P.2d 167 clearly held that it was "inconceivable" that the PERS board would seek to hold Stowe to his remedy under the Montana Administrative Procedures Act "while there was not even token compliance..." as is also the case here.

Defendant also relies on *Bradco Supply Co v. Larsen* which is flawed because, once again, this was a request for a rehearing which was barred by the fact the Public Service Commission did not have a provision for a rehearing. In this case the PSC never had a hearing so a rehearing was not possible. For the reasons stated, and *Stow*, this argument is not germane.

Further. MCA 69-3-403 allows "Any party..." to petition this court to grant injunctive relief until a final determination of lawfulness of an order is determined by this court. No time limitations are in this statute. MCA 69-3-401 specifically allows an injunction to trump a commission order. No time frame is listed. ("Any party" also goes to standing of Plaintiff as the courts can not modify statute.)

Further, MCA 2-9-111 specifically states that immunity from suit to "governmental entity" does not include "actions undertaken in the execution of a law or public policy." PSC claims they did this in the execution of a law and certainly it established public policy. No statutory time lines are included in the granting or denying of immunity. So no immunity is conveyed. Article II Section 18 Montana Constitution "...governmental

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entities shall have no immunity from suit for injury to a person or property..." Plaintiff submits that economic injury is included in this constitutional right.

Further, Rules of Civil Procedure, Rule 60 (d) provides: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative for a final judgment, order, or proceeding for the following reasons...(3) fraud, (whether intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party...."

In this case the fraud upon the people of Montana and the federal Commission is embodied in the misrepresentation of plainly worded state statute to the federal Commission. Misconduct is to a point of highly inappropriate, collusion between defendants. Violations are not only multiple but admitted in PSC documents as outlined in Complaint and shall be entered as evidence.

Further, Article II Section 18 of the Montana Constitution in total: State Subject to Suit. The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.

No law has been written that grants absolute immunity from suit to governmental entities that attempt to use time frame to hide multiple, willful, illegal acts. The immunity claimed is claimed to be of a higher purpose (prevention of "chaos" i.e. hiding of purposeful wrong doing) than stopping the net effect of an illegal action culminating in a crushing economic reality resulting in loss of property, income, investment, and probable loss of life. A Court Sitting in Equity would quickly discern that.

Further, Article VII Section 4. District Court Jurisdiction. (1) The district court has original jurisdiction in all criminal cases amounting to felony and all civil cases at law and in equity....

Further, the question of legality of the 1999 PSC action in question is only a part of the process. The appropriateness of the granting of EWG status by FERC given the fraud committed by the MT. PSC and PPL is a question without time restraint under FERC rules. The determination of lawfulness must be made to satisfy federal requirements for review. This action is but a step in a mandatory process.

Further, much of this case centers on the undisputed fact that under SB 390 1999 electrical generation may not be separated from the rate base until a transition plan has been accepted by the PSC. By admission of the Mt. PSC no such plan has ever been offered or accepted but it is still required by law (MCA 69-8-202). Therefore the question of public utility status is still ripe.

Amended Petition Seeking Declaratory Judgment Not subject to Thirty Day Rule on Proceedings for Judicial Review: A declaratory action pursuant to 2-4-506 MCA is not subject to the 30 day limit imposed on proceedings for judicial review in contested cases under this section. Missoula City-County Air Pollution Control Bd. V. Bd. Of Env'tl.

Review, 282 M 255, 937 P2d 463, 54 St. Rep. 338 (1997). As this action is a "Petition for Declaratory Judgment" this cite is valid. The "General Provision" for this is found under 2-4-102 (12) (a) "Significant interest to the public" means agency actions under this chapter regarding matters that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial fiscal impact to or controversy involving a particular class or group of individuals." Very plain and germane indeed. The only reason this is not concerning a contested case is that the PSC did not have the hearing as required by law. Definitely not a reason to not allow the exclusion to the 30 day rule on contested cases. The defendants (PPL and PSC) should not be allowed to benefit from their admitted purposeful illegal acts and the citizens of Montana should not be penalized by this purposeful omission by their PSC.

Further, *Highlands Golf Club v. Ashmore* 277 Mont. 324 "Supreme Court encourages a liberal interpretation of procedural rules governing judicial review of an administrative decision, rather than taking an overly-technical approach, so as to best serve justice and allow the parties to have their day in court." Further. "Motions to dismiss are construed in a light most favorable to the non-moving party, in this case Highlands, and should not be granted unless it appears beyond doubt that Hilands can prove no set of facts in support of its claim which would entitle it to relief. See *Lockwood v. W.R. Grace and Co.* (1995), 272 Mont. 202, 207, 900 P.2d 34; *Boehm v. Nelson* (1987), 229 Mont. 452, 453-54, 747 P.2d 213, 24. In considering the motion, the complaint is construed in the light most favorable to Hilands and all allegations of fact contained there in are taken as true. See *Lockwood*, 900 P.2d at 317; *Boehm*, 747 P.2d at 214.

THIS COURT HAS JURISDICTION OVER THE 1999 NCA AND THIS COMPLAINT

The cases cited by PPL do not address willful violations of law and willful misrepresentations to a Federal regulatory agency with the express purpose of inappropriate and unlawful regulatory involvement to increase the value of, and facilitate the sale of, private property in a private transaction.

Plaintiff has already made the proper cites and will not repeat here.

REBUTTAL TO "PLAINTIFF LACKS STANDING TO SUE"

Council for PPL correctly analyzes its own error in citing McTaggart v. PSC and MPC. The decision was on the fact that McTaggart was a sitting commissioner that had already had a vote on the issue. The decision stated that McTaggart should not be given a second chance by allowing him to "wear two hats" for he had sued as a rate payer. This was done for clarification of MCA 70-128. MCA 70-128 no longer exists.

Commissioner Molnar's action is significantly different in that he never had a vote on this issue. He was not a commissioner in 1999. Also he is not suing as a rate payer but

rather as the legally elected representative of rate payers (Rules of Civil Procedure Rule 60 (d) specifically allows legal representatives to bring this action. Commissioner Molnar is a quasi-judicial representative of the class of plaintiffs). Those were the only two issues in the McTaggart case. In fact at Molnar's home of record he is a co-op member and not a customer of NWE. Neither of the McTaggart findings/issues fit this case.

Further, Molnar is effectively held separate from the balance of the PSC Commissioners on this issue since a ruling by PSC Chief Legal Council Robin McHugh successfully segregated Molnar from the other Commissioners on this issue 6/5/06.

Further, in 1995 the state legislature passed the Montana Contractors Registration Act. State Representative Molnar sued the state in District Court (Beaverhead County) as a contractor in the building trades. Suit alleged 44 constitutional violations and was affirmed. The ensuing injunction was challenged by then Atty. General Joe Mazurek (Now opposing council for PPL) in the Mt. Supreme Court. Injunction was upheld 5-0. In this case Molnar did have a previous vote and "traded hats" to challenge in court.

Rebuttal's to Mortensen v. Pyramid Savings & Loan Association of Milwaukee, Setae ex rel Basista v. Melcher, Newman v. Richland County Historical Preservation Commission, Munhall v. Inland Wetlands Commission, and Cohen v. Board of Selectmen are all the same for all sites are similarly flawed in that they are concerning sitting members suing to overturn decisions they had a vote in. Again, Molnar was not on the commission when these issues were decided so he is not asking for a decision on a decision he was party to.

Vice Chairman Molnar takes strong exception to PPL's argument that "chaos would result" if Molnar were granted standing.

PPL council argues that persons acting as sitting policy makers should *never* have the capacity to obtain judicial review of illegal activities of previous commissioners and Dept. heads. That to do so would cause a rip in the fabric of society. Such a ruling would render meaningless MCA 1-2-110 "Any statute may be repealed at anytime ...Persons acting under any statute are deemed to have acted in contemplation of this power of repeal." If all persons legally engaged are considered on notice that special political privilege may be repealed at any time how much more so are persons acting outside the law that their ill gotten gains may be exposed and rolled back...like PPL's ill gotten gains? If not by a person in authority with special knowledge and capacity on who may the persons making up the society that PPL council is so concerned about rely to challenge wrongs? Indeed MCA 69-3-103 (1) clearly states... "nothing in this chapter shall be construed as vesting judicial powers on said commission or as denying to *any person*, firm, association, corporation...the right to test in a court of competent jurisdiction the legality or reasonableness or any fixed order made by the commission..." (Emphasis added). Clearly if statute allows "*any person*" to bring a challenge and the Montana Constitution Art. II Sec 16 mandates "Courts of Justice shall be open to *every*

person...” perhaps preceding courts were ill advised to make up lists of persons barred from bring actions of merit.

“Chaos would result?” In 2000, during the California energy crises, market based energy prices soared in Montana for those lacking long term contracts that had entered the deregulated market. As prices went from \$22.25 MWh to \$40 - \$50 per MWh the copper mines closed and Stone Container was forced to layoff many workers. The local cement factory suffered energy cost driven financial losses during that time frame. These are but a few reminders of then blaring headlines. These were direct consequences of PPL’s predatory marketing strategies as they wielded their hammer granted by FERC’s reliance on the false statements of the Montana Public Service Commission. By any measure “chaos” was preferred and manufactured by PPL.

Energy contracts now at \$32.50 per MWh are expected to go to \$57 per MWh if this action fails. How much “chaos” would be delivered to the society so protected and nurtured by PPL? Without constraining PPL power to serve Montana native load (and not be sold out of state as evidenced by attachment to Complaint) under “just and reasonable” rates \$57 might be the good news. Experts say that we would be more reliant on short term contracts and spot market profiteers. Total melt down for employers and families. As more and more residential/commercial customers defaulted on their utilities bills by statute the PSC would have to raise rates to recover the losses resulting in more defaults and more rate increases. Exactly like the melt down that happened in California, and for the same reasons. And PPL states they are concerned with preventing “chaos?”

Plaintiff admits that in the normal course of business that usually comes before the PSC chaos would ensue if untimely challenges were allowed and became common place. Case in point would be the Judith Gap Wind Farm decision. Plaintiff voted “no” in a 4-1 decision. Plaintiff wrote his dissent and pointed out that the decision was contrary to the laws applicable to procurement of the default supply portfolio. Since then it has come to light that the system is plagued with the problems predicted by Commissioner Molnar. Though there would be reason to challenge the ruling to do so, after such significant investments etc, would deem PSC commitments to be unreliable and dampen any desired to do business in any regime under PSC jurisdiction therefore bringing chaos to the structure of the state of Montana. However, in this narrow case, PPL knew when it sought EWG status that, even if it had been granted legally and under the guide lines of the law that the status would be revoked if certain market characteristics modified or there were a successful challenge to the legality of the stipulation of the PSC. The argument of “chaos” under this unique circumstance is simply not valid for the possibility of revocation is inherent in the original action.

If this scenario were the result of a misguided but legal act this action would indeed be inappropriate. But, it is the result of five willful commissioners, and legal staff, and PPL purposefully violating the law and purposefully misleading the Federal Energy and Regulatory Commission. Considering the action and probable consequences of that

illegal action it is well within the Inherent Power of the Court to use its Powers of Equity to hear this case in total.

PPL concludes that the proper remedy would be for Molnar to attempt to change a prior agency decision by appealing to the same agency; that he has not exhausted his administrative appeals. 1) As admitted in Docket no rules or procedures apply to this Docket's issues. It wasn't an order, or filing, or brief or rate or anything mentioned in PSC procedural rules. 2) Even if that were not true a request for oral argument (38.2.4808) must be filed no later than the last day to file replies. Further an application to rehear (38.2.4805) must be filed before the issuance of a commission decision or after the issuance of a proposed decision. Without having a hearing neither of these opportunities defacto existed.

And such appeals (even if possible and unchallenged by PPL as a violation of rules), and outcomes, would be worthless and implementation immediately challengeable for the PSC can not on its own determine if a law is illegal and enforce their finding. If the sitting commission announced that it had changed its mind such is not "a material change in fact", concerning lawfulness in regards to the previous granting of EWG status as required under FERC rules. The only criterion that federal regulators are concerned with is whether or not a state law was broken and/or mistruths affirmed. Only this court can make that determination, not the PSC. Further, any other course would use up precious time as our energy contracts expire in 13 months and an energy auction is scheduled for July. Only this court has all the capacities needed and this is the only viable vehicle the people of Montana have.

PPL's sites of Neuman, Supra, 480 S.E. 2d at 83 and Mont. Admin. R. 38.2.2403 (2005) do not exist so I shall not address them.

However if PPL meant ARM 38.2.2403 (2005) I would point out that same deals with a petition that may not be filed later than the intervention deadline established in the procedural order and same shall not be filed later than one week prior to the commencement of the hearing. Again, though mandated by law, as outlined in Complaint, and in Plaintiff's Opposition to Dismiss, and admitted in the Defendants Motion to Dismiss no hearing ever took place so no time line was established.

CONCLUSION

By all applicable statutes, rules, case law, and Prudent Man applications Complaint is ripe and plaintiffs have standing. The courts have a clear capacity to hear this case and a societal obligation to do so as quickly as possible.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing action of Brad Molnar has been served upon the following persons by first class mail, or by hand delivery, this 30th day of June 2006

David Kinnard PPL Montana LLC
303 N. Broadway
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Billings, Mt. 59101

Robin McHugh
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Brad Molnar _____

